Supreme Court, U.S.
FILED
NOV 28 1996
CLERK

No. 96-541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, and THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,

Petitioners

On Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

---

REPLY TO OPPOSITIONS TO PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI

RICHARD G. WILKINS *
BRENT V. MANNING
LEGRAND R. CURTIS
HOLME ROBERTS & OWEN
111 East Broadway
Suite 1100
Salt Lake City, Utah 84111
(801) 521-5800
* Counsel of Record
for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

23 pp
$10

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. THE *DEL PAPA* PETITION IS NOT SEPARATE FROM *WHITEHEAD* AND JUSTICES YOUNG AND ROSE ARE DISQUALIFIED FROM PARTICIPATION IN THAT CASE	1
II. THE PETITION IS TIMELY	3
III. *WHITEHEAD* IS NOT MOOT	5
IV. PETITIONERS HAVE STANDING TO LITIGATE THE CONSTITUTIONAL INVALIDITY OF THE MANDAMUS ORDER ENTERED AGAINST THEM	6
V. THE QUESTION PRESENTED IS SUBSTANTIAL AND DEMANDS THE COURT'S ATTENTION	8
CONCLUSION	10
APPENDIX J	
Petition For A Writ Of Prohibition Or In The Alternative For A Writ of Mandamus, Case No. 27847 (Nev. Dec. 21, 1995)	279a
APPENDIX K	
1996 Unofficial General Election Returns, Compiled by Dean Heller, Nevada Secretary of State	285a

TABLE OF AUTHORITIES

Cases	Page
Aetna Life Ins. v. Lavoie, 475 U.S. 822 (1986)	6, 8, 9, 10
Coleman v. Miller, 307 U.S. 433 (1939)	8
Ex Parte Bradstreet, 32 U.S. (7 Pet.) 634 (1833)	7
Ex Parte Hennen, 38 U.S. (13 Pet.) 230 (1839)	7
Ex parte Fahey, 332 U.S. 258 (1947)	7
Ex parte Wall, 107 U.S. (17 Otto) 265 (1883)	7
Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952)	4, 5
Hicks v. District of Columbia, 383 U.S. 252 (1966) (Douglas, J., dissenting)	3
Hill v. Hawes, 320 U.S. 520 (1944)	4
Hoffman v. Blaski, 363 U.S. 335 (1960)	7
In re Murchison, 349 U.S. 133 (1955)	9
In re Ronwin, 680 P.2d 107 (Ariz.), *cert. denied*, 464 U.S. 977 (1983)	3
In re Glancey, 542 A.2d 1350 (Penn. 1988)	5
In re Weeks, 658 P.2d 174 (Ariz. 1983) (*en banc*)	5
Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974)	8
LaBuy v. Howes Leather Co., 352 U.S. 249 (1957)	7
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	8
Nixon v. United States, 506 U.S. 224 (1993)	2-3
Parker and another against the Judges of the Circuit Court of Maryland, 25 U.S. (12 Wheat.) 561 (1827)	7
Parsons v. Chesapeake & Ohio Ry Co., 375 U.S. 70 (1963)	7
Patterson v. New York, 432 U.S. 197 (1977)	10
Powell v. McCormack, 395 U.S. 486 (1969)	6
Richfield Oil Corp. v. State Bd. Of Equalization, 329 U.S. 69 (1946)	4
Schreiner v. United States, 404 U.S. 66 (1971)	4
Street v. New York, 394 U.S. 576 (1969)	8
United States v. Lawrence, 3 U.S. (3 Dall.) 42 (1795)	7
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	6, 7

TABLE OF AUTHORITIES—Continued

	Page
Van Dusen v. Barrack, 376 U.S. 612 (1964)	7
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	10
Warth v. Seldin, 422 U.S. 490 (1975)	6
Wilkins v. United States, 441 U.S. 468 (1979)	4
Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)	7
Will v. United States, 389 U.S. 90 (1967)	7
Constitutions	
Nev. Const. art. VI, § 3	9
Statutes and Regulations	
28 U.S.C. § 1651 (1994)	3
Nevada Supreme Court Rule 7(8)	4
United States Supreme Court Rule 20	3
Miscellaneous	
Robert L. Stern et al., Supreme Court Practice, 275 (7th ed. 1993)	3, 4

INTRODUCTION

The Oppositions filed by Respondent Justices Robert Rose and C. Clifton Young (hereafter, "Rose Opp.") and Attorney General Frankie Sue Del Papa (hereafter, "Del Papa Opp.") raise a host of procedural objections to deflect the Court from the gravity of this case. Petitioners purportedly failed to seek disqualification of Justices Rose and Young in a "different case." Del Papa Opp. i, 19-20; Rose Opp. 12, 14. Respondents also assert the Petition is untimely (Del Papa Opp. 21-24; Rose Opp. 8-10), is moot (Rose Opp. 16), fails to establish standing (Del Papa Opp. 15-19; Rose Opp. 11-12), and does not present a substantial federal question. Del Papa Opp. 10-15; Rose Opp. 7-8, 14-15. These submissions are meritless.

I. THE *DEL PAPA* PETITION IS NOT SEPARATE FROM *WHITEHEAD* AND JUSTICES YOUNG AND ROSE ARE DISQUALIFIED FROM PARTICIPATION IN THAT CASE

The Oppositions assert the challenged writ was not entered in *Whitehead*. Del Papa Opp. i; Rose Opp. 1, 12-14. The Attorney General even submits she did *not* seek " 'to vacate a substantial portion of the rulings and relief entered in *Whitehead*,' " calling that assertion a "misstatement." Del Papa Opp. 8 (quoting Pet. 3). Respondents then argue that (1) Justices Rose and Young are not disqualified in the Attorney General's "different" proceeding and (2) the Justices' disqualification, in any event, was "waived." Del Papa Opp. i, 19-20; Rose Opp. 12-14. This dispute, however, is *not* a "different case" from *Whitehead* (Del Papa Opp. i)—a case in which Justices Rose and Young *are* recused.

The Attorney General's writ petition (App. J (attached)) shows on its face that it is not "different" from *Whitehead*. The only named respondents are the judges who ruled against her in *Whitehead*. App. J 279a. The only relief she seeks is an order "mandating that the Respondents cease all action in [*Whitehead*]." *Id.* at 280a. The "Statement of Facts" merely recites the background of *Whitehead*. *Id.* at 280a-283a. In fact, the only ground for

issuance of the writ is the Attorney General's contention that (Pet. App. 117a):

> the September 15, 1995 order entered by this court [*i.e.*, the disqualified Justices' order vacating the appointment of the Special Master] is competing with the December 15, 1995 opinion entered by the *White head* panel [*i.e.*, the court opinion vacating the September 15, 1995 order], thus creating a constitutional crisis which the [Attorney General] has been drawn into by virtue of her office.

The Attorney General, in short, simply asked the Nevada Supreme Court to alter the orders and relief entered in *Whitehead*. In granting that request (Pet. App. 1a), the disqualified Justices unquestionably vacated " 'a substantial portion of the rulings and relief entered in *Whitehead*.' " Del Papa Opp. 8 (quoting Pet. 3); *see* Pet. 16-19. Indeed, the disqualified Justices terminated *Whitehead* by ordering the clerk on July 12, 1996 "to accept no [further] filings." Pet. App. 5a.

Accordingly, the only distinction between the disqualified Justices' direct participation in *Whitehead* and their issuance of the disputed orders is one of mere nomenclature: the Attorney General attempted to create a new caption for the *Whitehead case*. There is, therefore, no merit to Respondents' claims that the Respondent Justices are not disqualified or that their disqualification was "waived" by procedural irregularities. Del Papa Opp. 19-20; Rose Opp. 12-14. When the disqualified Justices reversed various *Whitehead* rulings and terminated the case on July 12, 1995 (Pet. App. 1a), they were already disqualified in that matter.[1]

---

[1] Respondents assert that their recusal was "voluntary" and imply that it was even unnecessary. *E.g.*, Rose Opp. 4. But, as set out in the Petition, there were good grounds indeed for disqualifying the Justices from considering a challenge to judicial disciplinary procedures. Pet. 8 n.2. *Compare* grounds for Justice Rose's recusal (being "secretly recorded * * * telling the district attorney that he would 'love' to see the criminal charges pending against two friends, one a business associate, 'go away' ") (Pet. 8 n.2) *with Nixon v. United States*, 506 U.S. 224, 226 (1993) (federal judge

Respondents, finally, assert (without explaining the significance of the assertion) that Chief Justice Steffen and Associate Justice Springer are "disqualified" from ruling on the Attorney General's petition for the simple reason that they are named as respondents. Rose Opp. 12. Respondents err. The Attorney General's petition is nothing more than a motion for relief in *Whitehead* and Petitioners are *not* disqualified in *Whitehead*. Furthermore, the argument that Petitioners are disqualified because the Attorney General sued them is extremely dangerous. The well-established rule throughout the country is that litigants may not "stack the judicial deck" by the naive expedient of suing a judge who has ruled against them, asking for reversal, and then asserting that the defendant judge is disqualified. Pet. App. 152a-155a (citing copious authority). *In re Ronwin*, 680 P.2d 107, 117 (Ariz.), *cert. denied*, 464 U.S. 977 (1983) (disqualification should not be put "in the hands of the most unscrupulous").

II. THE PETITION IS TIMELY

Any claim that the Petition is untimely (Del Papa Opp. 21-24; Rose Opp. 8-10) is vacuous. There is no time period for filing extraordinary writs and the Petition (in any event) was filed within 90 days of the final action of the disqualified Justices.

The Petition seeks extraordinary relief. "There are no time limitations specified in statute or rule for filing in the Supreme Court an application for one of the extraordinary writs, such as mandamus, prohibition, habeas corpus, or common-law certiorari." Robert L. Stern et al., Supreme Court Practice 275 (7th ed. 1993). *See* 28 U.S.C. § 1651 (1994); Sup. Ct. R. 20; *Hicks v. District of Columbia*, 383 U.S. 252, 253 (1966) (Douglas, J., dissenting).

---

impeached for accepting "a gratuity * * * in exchange for asking a local district attorney to halt the prosecution of [a] businessman's son"). *See also* Pet. 20 n.7 (once disqualified, even erroneously recused judges may not reenter case).

And, even if subjected to certiorari limits,[2] "an examination of the entire record" shows the Petition is timely. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946). The Petition was filed within 90 days of the July 12, 1996 order. Pet. App. 1a. That order—which reentered previously vacated rulings—is the appropriate point from which to calculate the certiorari period.[3] In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952), the Court explained that reentry of a judgment restarts the 90-day period "when the lower court * * * resolves a genuine ambiguity * * * in a judgment previously rendered." The test "is a practical one." *Id.* "The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* The July order meets this test.

The September 15, 1995 order (which the disqualified Justices assert was their "final" order, Rose Opp. 8) was vacated by three of the four members of the *Whitehead* panel (Pet. App. 92a)—not, as Respondents erroneously assert, by an order of "Justices Steffen and Springer." Rose Opp. 5.[4] The April 25, 1996 writ of prohibition, in

---

[2] If a petition for extraordinary relief is filed, the Court may "convert[] [the] petition * * * into a petition for certiorari" and "disregard the certiorari time limitations." Stern et al., *supra*, at 275.

[3] *Wilkins v. United States*, 441 U.S. 468, 470 (1979) (90 days run from reentry of vacated decision; Court directs vacation and reentry of judgment to permit timely certiorari petition); *Schreiner v. United States*, 404 U.S. 66, 67 (1971) (same); *Hill v. Hawes*, 320 U.S. 520, 523-524 (1944) (same).

[4] Justices Rose and Young erroneously assert that the September 15, 1995 "administrative order" is only "subject to modification by a majority" of "elected Justices of the Nevada Supreme Court." Rose Opp. 8. The rules of the Nevada Supreme Court, however, nowhere require action by a majority of the "elected" Justices. Rather, Nevada Supreme Court Rule 7(8) allows a majority of the court to void an administrative order. The September 15, 1995 "administrative order" was voided by a majority of the Nevada Supreme Court. Pet. App. 92a.

turn, was vacated "because of the federal and Nevada requirements of due process" by a July 5, 1996 order of the Nevada Supreme Court. Pet. App. 160a. Accordingly, the disqualified Justices' orders were not "final" until all decisions vacating those orders were set aside on July 12, 1996. Pet. App. 1a.

The July 12, 1996 order, therefore, "resolve[d] a genuine ambiguity." *Minneapolis-Honeywell*, 344 U.S. at 211. Until that date, it was not clear what "legal rights and obligations * * * had been plainly and properly settled with finality." 344 U.S. at 212. The July order—and only the July order—plainly (although not properly) disposed of *Whitehead*. The Petition is timely.

III. *WHITEHEAD* IS NOT MOOT

Respondents contend the Petition is moot because "Judge Whitehead has resigned," the "Special Master has ceased to function," and the "intramural dispute in the Nevada Supreme Court has come to rest." Rose Opp. 16. These claims do not demonstrate mootness.

Although Judge Whitehead has retired, the proceeding he filed before the Nevada Supreme Court is not moot. Judge Whitehead requested—and obtained—an order appointing a Special Master to investigate the source of the devastating breaches of confidentiality surrounding his judicial disciplinary proceeding. Pet. App. 9a. The Special Master was appointed to "determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings" and "the extent to which they may have impacted [Judge Whitehead's] due process rights." Pet. App. 28a. Judge Whitehead (and the Nevada Supreme Court) retain a live interest in the completion of this task.[6] *See* Judge Whitehead's Motion for Leave to Intervene as Petitioner at 1-3, No. 96-829 (filed Nov. 21, 1996).

---

[6] *In re Glancey*, 542 A.2d 1350, 1353 (Penn. 1988) ("Where other issues remain for adjudication," a judicial disciplinary action is not rendered moot when a judge resigns); *In re Weeks*, 658 P.2d 174, 176 (Ariz. 1983) (*en banc*) (a judge's resignation does not render a disciplinary proceeding moot when deciding the case could aid

The Special Master, furthermore, has "ceased to function" and the matter has "come to rest" (Rose Opp. 16) only because of the disqualified Justices' unconstitutional order. The Special Master states in his interim report that he "still harbor[s] some hope that [he] might be allowed to continue in the search for truth." Pet. App. 107a. Relief from this Court will permit the Special Master's search to continue. Accordingly, the Petition presents the Court with a live controversy. *Powell v. McCormack*, 395 U.S. 486, 496-497 (1969) (a single live issue "suppl[ies] the constitutional requirement of a case or controversy").

IV. PETITIONERS HAVE STANDING TO LITIGATE THE CONSTITUTIONAL INVALIDITY OF THE MANDAMUS ORDER ENTERED AGAINST THEM

According to Respondents, the Attorney General has filed—and the disqualified Justices have decided—a remarkable suit: one absolutely immune from review for constitutional error. Petitioners purportedly have no "personal, particularized, imminent injury upon which standing can be based." Rose Opp. 11. But, if Petitioners lack such injury, *no one* named in the Attorney General's pleading has standing because all of the respondents suffered the same wrong: unlawful termination of a court order. Standing doctrine does not mandate this absurd result.

Petitioners have not presented a "generalized grievance[]" (Rose Opp. 11, quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) nor an "abstract' question." Del Papa Opp. 15 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)). On the contrary, Petitioners have claimed a precise, concrete, and actual injury: the unconstitutional issuance of a writ of prohibition restraining their performance of judicial duties. Pet. App. 132a (writ directs Petitioners "to cease and desist from

---

state officials in carrying out their duties in the future). *Cf. Lavoie*, 475 U.S. at 823 n.2 (Court decides disqualification issue even though the disqualified jurist had "retired from the court for health reasons").

any further action in the investigation launched in [*Whitehead*]"). This direct, personal command vests Petitioners with standing to raise its constitutional invalidity.

Indeed, the Court has routinely recognized that judges subjected to an extraordinary writ are proper litigants in proceedings reviewing the propriety of the writ. As noted in *Ex parte Fahey*, 332 U.S. 258, 260 (1947), one of the "consequence[s]" of an extraordinary writ is that it "mak[es] the judge a litigant." *Accord, LaBuy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957) (extraordinary writs "place[] trial judges in the anomalous position of being litigants"). Once a judge becomes a "litigant," he may seek review of the writ issued against him. *E.g., Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978).[6] It is far too late in the day to contend seriously that judges lack "standing" to raise the impropriety of an extraordinary writ.[7]

As stated in *Valley Forge*, whatever the difficulties of standing doctrine, "of one thing we may be sure: those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." 454 U.S. at 475-476. Judges subjected to an extraordinary writ have historically—and regularly—"litigate[d] as suitors" before this Court. *Id.*; note 6, *supra*. They unquestionably have "Art. III standing." 454 U.S. at 476.[8]

---

[6] *See also Will v. United States*, 389 U.S. 90, 91-92 (1967); *Van Dusen v. Barrack*, 376 U.S. 612, 614-615 (1964); *Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 70, 71 (1963); *Hoffman v. Blaski*, 363 U.S. 335, 337-338 (1960); *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795); *Parker and another against the Judges of the Circuit Court of Maryland*, 25 U.S. (12 Wheat.) 561 (1827); *Ex Parte Bradstreet*, 32 U.S. (7 Pet.) 634 (1833); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839); *Ex parte Wall*, 107 U.S. (17 Otto) 265 (1883).

[7] None of the standing cases cited by Respondents (*e.g.*, Del Papa Opp. 16-18) involve an appeal of a writ of mandamus issued against a judge. They are, therefore, inapposite.

[8] Standing is also established by analogy to cases that accord legislators standing to maintain the effectiveness of their votes. Respondents admit that Petitioners—at the very least—have suffered the injury of "having decisive weight withheld from their

V. THE QUESTION PRESENTED IS SUBSTANTIAL AND DEMANDS THE COURT'S ATTENTION

Contrary to the unsupportable submission that "[t]he federal question * * * was never raised" below (Del Papa Opp. 14) (*accord*, Rose Opp. 13-14), the constitutional impropriety of the disqualified Justices' action was forcefully brought to their attention. Pet. App. 160a ("The two disqualified Justices are also disabled from action in [*Whitehead*] * * * *because of the federal and Nevada requirements of due process*") (emphasis added); *id.* at 163a ("the opinion and writ issued by the [disqualified] Justices on April 25, 1996 * * * was entertained and entered without due process of law" and is "therefore void"). These references to the demands of due process—made during extended discussions of *Lavoie* (Pet. App. 155a-163a)—unequivocally raised the Question Presented.[9]

The Question Presented, furthermore, is *substantial*. Although Respondent Del Papa asserts *Lavoie* "says nothing about whether [recused judges] * * * can return to the case at a later stage" (Del Papa Opp. 11) and the Respondent Justices argue that no issue of "constitutional" disqualification is involved (Rose Opp. 14-15), neither contention has merit.

Lavoie has *much* to say about whether a once-recused judge "can return to the case at a later stage." Del Papa

---

votes in the disputes below." Rose Opp. 8. This injury is quite sufficient to establish standing. In *Coleman v. Miller*, 307 U.S. 433 (1939), the Court concluded that when legislators' votes "have been overridden and virtually held for naught * * * [they] have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Accord, Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (Senator has standing when his vote has "been nullified"). The votes of Petitioners "have been overridden and virtually held for naught" by the disqualified Justices. *Coleman*, 307 U.S. at 438. Because the Due Process Clause prohibits disqualified judges from casting the deciding vote (*Lavoie*, 475 U.S. at 827-28), Petitioners have "a right and privilege under the Constitution of the United States to have their votes given effect." *Coleman*, 307 U.S. at 438. Petitioners, in short, have standing.

[9] *Street v. New York*, 394 U.S. 576, 584 (1969) (question need only be raised " 'with fair precision and in due time' ") (quoting *New York v. Zimmerman*, 278 U.S. 63, 67 (1928)).

Opp. 11. *Lavoie* establishes beyond peradventure the constitutionally required remedy for a disqualified judge's disposition of a case: vacation. This Court emphasized that "we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." 475 U.S. at 827-28. Rather than a mere "fragment" (Rose Opp. 7), this constitutional remedy is the heart of *Lavoie*.

Moreover, although the Respondent Justices are already disqualified and need not be recused again, even if it were necessary to establish their "constitutional" bias (Rose Opp. 14-15), such bias is evident. A mere 13 days after the Special Master uncovered evidence of wrongdoing on the part of the Attorney General and the disqualified Justices (Pet. App. 211a, 251a),[10] the disqualified Justices purportedly terminated the Special Master's investigation (Pet. App. 7a) and did not rest until they had finally achieved that result. Pet. App. 1a. When sitting Justices of a State's highest court have not only re-entered (and decided) a case in which they are already disqualified, but have done so after evidence of their own possible wrongdoing has become public, the federal question is anything but "exiguous." Rose Opp. 8. It is overwhelmingly important.

This Court long ago "recognized that, under the Due Process Clause, no judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.' " *Lavoie*, 475 U.S. at 822 (quoting *In re Murchison*, 349 U.S. 133, 136 (1995)). The disqualified Justices, who must regularly face reelection,[11] unquestion-

---

[10] Among other things, the Special Master discovered that a *Whitehead* brief had been faxed improperly by the Attorney General's office to a Nevada lawyer (Pet. App. 211a), who had numerous contacts with the Nevada press (Pet. App. 229a-230a) and who met "with Justice Rose at about the time that the first newspaper articles began appearing concerning the Whitehead matter." Pet. App. 251a.

[11] Nev. Const. Art. 6, § 3. Justice Young's incentive for thwarting the investigation was especially high as he was in a reelection

ably have a direct, personal and pecuniary interest in preventing the continuation of an investigation that has uncovered evidence—and might well produce indisputable proof—of their contempt for orders emanating from their own court.

CONCLUSION

The Petition does not present an "intramural dispute" that can be appropriately disregarded. Rose Opp. 16. Petitioners invoke the Court's aid in enforcing a " 'principle of justice so rooted in the traditions and conscience of our peoples as to be ranked as fundamental' " (*Lavoie*, 475 U.S. at 821 (*quoting Patterson v. New York*, 432 U.S. 197, 201-202 (1977)): the due process axiom that judgments cannot stand if there is "a possible temptation to the average [judge not] * * * to hold the balance nice, clear and true.' " *Lavoie*, 475 U.S. at 822 (*quoting Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). The entire confidence of the People of Nevada in the fundamental fairness of their judicial system lies in the hands of the Court. Absent intervention, Nevada litigants will understandably conclude that state judges may not only reenter matters in which they are recused, but may decide cases in which they have a personal stake.

The Respondent Justices have not offered any justification for their frank disregard of due process but, instead, have raised a litany of meritless technical barriers. Sections I-V, *infra*. The reason why is plain: there *is* no constitutionally cognizable justification for their action. The Court should summarily issue a writ vacating the July 12, 1996 order and direct Justices Robert Rose and C. Clifford Young to refrain from directly or indirectly modifying the rulings made or relief entered in *Whitehead*, including any actions interfering with the appointment of necessary replacement judges.

---

campaign this year. The 1996 campaign was unusually close; he was reelected by a three percent margin and received only 41 percent of the total vote. Pet. App. K (attached) at 286a (Unofficial Election Returns, Nevada Secretary of State).

Respectfully submitted,

RICHARD G. WILKINS *
BRENT V. MANNING
LEGRAND R. CURTIS
HOLME ROBERTS & OWEN
111 East Broadway
Suite 1100
Salt Lake City, Utah 84111
(801) 521-5800
* Counsel of Record
for Petitioners

November 29, 1996

APPENDICES

APPENDICES

APPENDIX J

[Filed Dec. 21, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL, FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,
Respondents.

PETITION FOR A WRIT OF PROHIBITION
OR IN THE ALTERNATIVE FOR A WRIT
OF MANDAMUS

The Petitioner, Attorney General Frankie Sue Del Papa, hereby petitions this Honorable Court, pursuant to NRS 34.150, *et seq.*, NRS 34.320, *et seq.* and NRAP 21 for issuance of a Writ of Prohibition or in the alternative for a Writ of Mandamus prohibiting and/or mandating that the Respondents cease all action in Supreme Court Case No. 24598 and in particular all action in furtherance of the unlawful and unconstitutional investigation directed against the Petitioner and numerous unnamed individuals identified by Respondent Herbert F. Ahlswede, Special Master of the "Whitehead Court" (hereinafter Respondent Ahlswede), appointed by Respondent Justices on September 1, 1995.

Petitioner further requests the Court to enter an order immediately staying such proceedings pending its ruling

on the merits of this petition. Petitioner alleges, as is more particularly described below, that Respondent Justices, by taking any further action in Case No. 24598 and by appointing and directing the Respondent special investigator to investigate Petitioner and others, and by proceeding with such investigation in violation of the order of a majority of this Court, are exceeding their lawful jurisdiction and that such actions are subject to a writ of prohibition. In the alternative Petitioner requests that this Court issue a Writ of Mandamus directing Respondents cease all action in Case No. 24598 and discharge special investigator, Herbert R. Ahlswede from conducting any further investigatory or prosecutorial activities pursuant to the Respondents' September 1, 1995, ORDER APPOINTING SPECIAL MASTER.

I. STATEMENT OF FACTS

1. On September 1, 1995, Respondents Steffen and Zenoff signed and filed an order in Supreme Court Case No. 24598, purporting to appoint Respondent Ahlswede to investigate the sources of press stories about *Whitehead v. Comm'n on Judicial Discipline,* Supreme Court Case No. 24598 and to inquire "into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system. . . ." *See* Exhibit A attached.

2. On September 7, 1995, this Court filed a petition on the administrative docket of the court, ADKT 221, noting that there is no express authority for a panel to appoint a special prosecutor/investigator and no authority to expend funds in this regard without a vote of a majoriy of the elected supreme court justices. The petition asked the Court to consider entering an order vacating the appointment of the special investigator. *See* Exhibit B attached hereto.

3. On September 15, 1995, this Court entered an order in ADKT 221 in which it found that appointment of the special master in Case No. 24598 exceeded the panel's jurisdiction and purported to authorize the expenditure of

public funds. The Court further found that the appointment of a "special master/investigator" and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources." *See* Exhibit C attached hereto.

The Court voided the order appointing the special master and prohibited the payment or any costs or related expenditures.

4. Respondent Justices have received a confidential document styled "MASTER'S INTERIM REPORT" in which the Petitioner and/or members of her staff are identified as having been a party or parties to "an intentional and knowing disclosure of confidential matters relating to the Whitehead matter before the Judicial Discipline Commission," that a statement attributed to Petitioner by a former member of the Attorney General's office purportedly made by Petitioner during a staff meeting "should be explored." Respondent Ahlswede's unsupported and insupportable allegations have caused and will continue to cause Petitioner injury unless the activities of Ahlswede authorized by Respondent Justices are stayed pending a determination of the merits of this petition and relief in the nature of a Writ of Prohibition or in the alternative Mandamus is entered by this Court following a determination of the merits of this petition.

5. On December 15, 1995, the Respondents Steffen, Springer and Zenoff entered an Opinion in Case No. 24598, which adjudged an order of the Court dated September 15, 1995, to be a nullity and of no legal force or effect. *See* Exhibit D attached hereto. The September 15, 1995, order signed by Justices Young, Rose, and Shearing had rendered the Respondents' appointment of Ahlswede void. The Respondents have attempted to reinstate the unconstitutional and unlawful appointment of Ahlswede and have confirmed, adopted and unleased the unbridled authority on the part of Respondent Ahlswede to pursue a fabricated and baseless inquisition into the legitimate functions of Petitioner's office, the constitutionally protected

speech of Petitioner and of private individuals and to engage in an interrogation of the members of the Court itself.

6. The competing Orders of September 15, 1995, and December 15, 1995, entered by Respondent Justices in Case No. 24598 and by a majority of the Supreme Court have created a constitutional crisis which the Petitioner has been drawn into by reason of her office. Petitioner submits that she has standing on her own behalf as well as the status she has as the duly elected and acting legal representative of the citizen's of the State to complain of Respondents unprecedented action in commissioning Ahlswede's activities, by acting as investigators, prosecutors and judges in a single action, and by refusing to obey an order issued by a majority of the duly elected justices of this Court.

7. Any supposed leaks of information from a case which under state law and court rules should have been open to the public pales in comparison to the self-destructive maneuvers implicated by the recent activities of the Respondents.

8. The Ahlswede appointment which Respondent Justices have attempted to reinstate, in the face of a Supreme Court order signed by a majority of the duly elected justices, dissolving the appointment is symptomatic of a crisis on the court. Unless and until the lawfully constituted authority of this Honorable Court is restored to the majority of the elected members of the Court and the conflicting orders of the Court are reconciled by the relief requested herein, Petitioner's and others rights will be violated, and subjected to conflicting and inconsistent directives concerning an extra judicial inquisitorial process.

9. Petitioner is without an adequate remedy at law in this matter. The inquisitorial process which Respondents have initiated will subject her and others to an unconstitutional and unlawful interference with the orderly operation of her office, a denial of due process and violations of federal constitutional rights. There is no forum except

this Court in which the Petitioner can presently seek relief by way of prohibition or mandamus from the Respondents' abuses of power which are set forth herein. Under these circumstances, the elected members of this Court must correct the unconstitutional and unlawful investigation that Respondents have created.

II. RELIEF SOUGHT

WHEREAS, Petitioner prays this Court:

1. Stay all actions of Respondent Justices Steffen, Springer and Zenoff in Case No. 24598 and by Respondents Special Master Ahlswede which have been authorized by Respondent Justices pending determination of this Petition on its merits.

2. Enter an order setting an expedited scheduling order for briefing and submitting the case for decision on the briefs.

Petitioner further prays for a Writ of Prohibition or in the Alternative a Writ of Mandamus restraining Respondent Justices from taking any further action in Case No. 24598 and restraining Respondent Special Master Ahlswede from proceeding with any further activities of an investigatory or prosecutorial nature involving the Petitioner or members of her staff on the basis of the Respondent Justices order of September 1, 1995, styled ORDER APPOINTING SPECIAL MASTER. Petitioner prays for further relief which the Court may deem appropriate in this matter.

DATED this 20th day of December, 1995.

/s/ Frankie Sue Del Papa
FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
State Bar No. 192
Capitol Complex
Carson City, Nevada 89710
(702) 687-3510

VERIFICATION

STATE OF NEVADA)
) ss:
CARSON CITY)

I, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, do hereby under penalties of Perjury the following is true:

1. I am the petitioner in the above-named action.

2. I have read the foregoing petition for a Writ of Prohibition or in the Alternative for a Writ of Mandamus and know the contents thereof and that the same are true of my own knowledge, except as to those matters stated to be upon information and belief, which matters I believe to be true.

DATED this 20th day of December, 1995.

/s/ Frankie Sue Del Papa
FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
State Bar No. 192
Capitol Complex
Carson City, Nevada 89710
(702) 687-3510

SIGNED AND SWORN TO before me this 20th day of December 1995, by FRANKIE SUE DEL PAPA.

/s/ Reba Coombs
REBA COOMBS
Notary Public

APPENDIX K

1996

UNOFFICIAL

General Election Returns

This is the unofficial abstract of the votes cast at the November 5, 1996, General Election in the State of Nevada.

[STATE SEAL]

Compiled by

Dean Heller

Secretary of State

Supreme Court Justice, Seat D (Nonpartisan)								
Jones, Steve	6,649	2,335	89,859	4,884	4,005	153	216	1,396
Young, Cliff	7,089	2,848	91,632	5,780	4,869	195	243	1,891
"None of these candidates'	3,884	2,067	42,302	3,839	2,728	153	175	977

669	767	3,265	798	3,143	528	529	34,961	1,140	155,257
923	561	3,629	924	3,549	691	626	40,715	1,208	166,872
508	347	2,225	515	1,854	289	427	24,372	690	87,352